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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARK OWEN LAUN, Defendant and Appellant.	G055893 (Super. Ct. No. 16HF0902) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel and Mary Katherine Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

Mark Owen Laun appeals from a judgment after a jury convicted him of domestic battery with corporal injury and assault with a deadly weapon and found true he used a deadly weapon. Laun argues the trial court erred by instructing the jury on assault with a deadly weapon, and alternatively he received ineffective assistance of counsel (IAC).

After oral argument, we vacated submission and invited the parties to file supplemental letter briefs on the effect, if any, of *People v. Aledamat* (2019) 8 Cal.5th 1 (*Aledamat*), on this appeal, and the parties complied. None of Laun's contentions have merit, and we affirm the judgment.

FACTS

Laun lived in a commercial building in Irvine where he worked. In February 2015, Laun and Jane Doe, who lived in China, met online. A few months later, Laun visited Doe in China. Six months later, Doe moved in with Laun and they got married days later. Doe, who could not speak English, enrolled in English classes.

Within a month, neither party was happy, and sexual intercourse was a frequent topic of disagreement. In February 2016, Laun sent Doe e-mails pressuring her to have sexual intercourse with him and in one e-mail stated that if the immigration department discovered she did not want "to sleep with [him]" it would charge her with fraud.

Four months later, there was an incident that led to Doe being transported to the hospital and receiving stitches on her right arm. Because the parties disagree about the events, we will provide their different versions of the events through their testimony.

An information charged Laun with domestic battery with corporal injury (Pen. Code, § 273.5, subd. (a), all further statutory references are to the Penal Code) (count 1), and aggravated assault (§ 245, subd. (a)(1)) (count 2). As to count 1, the information alleged he personally used a deadly weapon. (§ 12022, subd. (b)(1).) With

respect to counts 1 and 2, the information alleged he inflicted great bodily injury (GBI). (§ 12022.7, subd. (e).)

At the time of trial, Doe was living in China and the prosecution was unable to compel her appearance. Her preliminary hearing testimony was read to the jury. Doe testified that before she moved to the United States, she told Laun that she had a medical condition that sometimes made sexual intercourse painful. After she married Laun, when she did not want to have sex, he would become angry, and they would argue. Laun told her that Jesus Christ said to obey her husband and she was not a good wife. Doe testified that "at the beginning when [she] refused it, he still forced it."

After having sexual intercourse with him one day in June 2016, she decided to return to China. Doe testified that the next morning, she took her passport from Laun's drawer and gave it to a friend. Later that day, she asked him for a divorce. After he got her luggage, he began drinking alcohol and said he would give her another chance. Doe took a shower and went to the bedroom. Laun continued drinking in the kitchen and later went into the bedroom to talk to Doe. She told him that she did not want to talk anymore and wanted to go to sleep. Laun was upset and lost his temper. Doe testified Laun grabbed a beer bottle from the desk, smashed it against another beer bottle, and stabbed Doe twice in the right shoulder. Doe ran outside and called 911.

When police arrived, Doe was standing outside with blood dripping down her arm. Officers, including Officer Jayson Vespia, searched the building. On the second floor, they found Laun standing in the doorway of his room sweeping with a broom—there was glass and blood on the ground. Vespia asked Laun where the blood came from. He replied it was possibly from Doe walking through the glass with bare feet. Vespia found the broken beer bottle in a trash can next to Laun's desk. Doe was transported to the hospital where she received stitches.

Laun testified that soon after the marriage he became concerned about Doe's commitment to him for a variety of reasons, including intimacy issues. Laun

became suspicious Doe married him to obtain entry to the United States. The day before the incident, Laun sent Doe an e-mail stating he wanted to end the marriage and he would buy her a plane ticket and give her $1,000. In her e-mail response, Doe provided a timeline of their relationship, which caused Laun to believe she was preparing to accuse him of domestic violence.

Laun stated that on the evening of the incident, he drank two alcoholic beverages, took two sleeping pills, and fell asleep in his chair. When he woke up, he saw glass and blood on the floor. He suspected Doe was trying to frame him for injuring her so she could remain in the United States. Additionally, Laun offered testimony from a detective who stated Doe told her that Laun attacked her on the bed. Laun also offered testimony as to his good character and peaceful nature. During closing argument, Laun's defense counsel argued Doe stabbed herself and framed Laun so she could remain in the country.

As relevant here, the trial court instructed the jury with CALCRIM No. 875 concerning count 2's elements and CALCRIM No. 3145 regarding the personal use of a deadly weapon enhancement alleged as to count 1 without objection or request for clarification from Laun. We will discuss the instructions below.

The jury convicted Laun of both counts and found true he personally used a deadly weapon as to count 1 (§ 12022, subd. (b)(1)). However, the jury found not true he inflicted GBI (§ 12022.7, subd. (e)). After the trial court denied his new trial motion, the court sentenced Laun to five years in prison (upper term of four years on count 1 and one year for the weapon enhancement) and suspended sentence. The court imposed and stayed the sentence on count 2 (§ 654). The court placed him on three years of probation and ordered him to serve 180 days in jail.

DISCUSSION

Laun argues the trial court erred by instructing the jury with CALCRIM Nos. 875 and 3145 because they presented the jury with a legally invalid theory

concerning an inherently dangerous weapon and the record does not establish the jury relied on the valid theory. Alternatively, he contends he received IAC because his defense counsel did not object to the instructions. Because Laun raises IAC (*People v. Marlow* (2004) 34 Cal.4th 131, 150 [addressing merits of forfeited claim because defendant asserted IAC]), we will address the merits, and his IAC claim is moot. As we explain below, a broken beer bottle is inherently deadly.

An object can be a deadly weapon either (1) if it is inherently deadly in the ordinary use for which it was designed or (2) the object is used in a manner likely to produce GBI. (*Aledamat, supra,* 8 Cal.5th at p. 6; § 245, subd. (a)(1).) "'In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]'" (*Ibid*.)

Here, the relevant portion of CALCRIM No. 875 provided, "A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or [GBI]." The relevant portion of CALCRIM No. 3145 stated, "A *deadly* or dangerous *weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or [GBI]." We review a claim of instructional error de novo and determine whether there was a reasonable likelihood the jury misapplied the instructions in violation of the Constitution. (*People v. Mitchell* (2019) 7 Cal.5th 561, 579.)

Contrary to Laun's claim, a broken, "beer bottle top" is not designed to contain and pour beer. The bottle top was broken from the body of the bottle to create an instrument that had no other purpose than to cause injury. We have viewed the picture of the broken beer bottle top. It was not suitable for containing or pouring beer. He did not break the bottle to drink from it. A glass bottle that is purposefully broken to have sharp edges for stabbing is inherently deadly in the ordinary use and nature for which it was

modified. (*People v. Cabral* (1975) 51 Cal.App.3d 707, 712-713 [prisoner altered bedspring to create design and use dirk or dagger for only one "obvious[]" purpose—a deadly weapon].) The broken beer bottle had no other purpose. Thus, Laun's reliance on cases, such as *People v. McCoy* (1944) 25 Cal.2d 177, 188 [knife] and *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317 [box cutter], that involved objects ordinarily used for non-deadly or dangerous purposes is misplaced.

Laun asserts the modification of a non-deadly weapon into a deadly weapon is "a distinction without a difference, because whether a defendant *uses* an object in ordinary use as a weapon . . . or modifies it in order to use it as a weapon . . . the jury must determine whether a defendant has used an object in ordinary use 'in such a manner as to be capable of producing and *likely to produce*, death or [GBI] . . . .' [Citations.]" Contrary to Laun's claim, the instructions did not relieve the jury from making a required finding. To be a deadly weapon, an object can be *either* inherently deadly *or* used in a manner likely to produce death or GBI. It need not be both, but here the modified beer bottle satisfied both legal theories.

Laun cites to *People v. Brown* (2012) 210 Cal.App.4th 1, 7, for the proposition a beer bottle is not deadly per se. The *Brown* court, while addressing whether a BB gun was a deadly weapon, provided examples of objects that were not deadly per se, including "a bottle or pencil." The *Brown* court did not state a broken glass bottle top was not a deadly weapon per se. To support its assertion, the *Brown* court cited to *People v. Zermeno* (1999) 21 Cal.4th 927, 931 (*Zermeno*), in which the court addressed the scope of the street terrorism enhancement (§ 186.22, subd. (b)(1)). In discussing whether defendant and a fellow gang member worked together, the court reasoned, "While defendant was assaulting [the victim] with a deadly weapon (the beer bottle), [his confederate] positioned himself between the two groups of men . . . ." (*Zermeno, supra,* 21 Cal.4th at p. 931.) Neither *Brown* nor *Zermeno* assist Laun.

The fact the jury returned not true findings on the GBI enhancements was not inconsistent with the jury's verdicts. A person can use a deadly weapon without actually inflicting GBI. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261.) Thus, CALCRIM Nos. 875 and 3145 did not present the jury with a legally invalid theory of criminal liability and there was no legal error.[1] Thus, we need not discuss *Aledamat, supra,* 8 Cal.5th at pages 7, 9, which addressed the proper standard of review when a trial court commits error and instructs the jury on a legally correct and legally incorrect theory.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

GOETHALS, J.

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[1] In his opening brief, Laun also argues the trial court erred by failing to instruct the jury sua sponte on assault with a deadly weapon's lesser included offense, assault. Citing to the trial court's discussion with counsel regarding the instructions, the Attorney General asserts defense counsel made a tactical decision to request the trial court not instruct the jury on any lesser included offenses. (*People v. Souza* (2012) 54 Cal.4th 90, 114 [invited error where trial counsel expresses tactical reason for declining complained of instruction].) In his reply brief, Laun acknowledges counsel's tactical decision and withdraws this argument.